U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 December 2006

CASE NOS.: 2005-LHC-613
2005-LHC-614
2005-LHC-615

OWCP NOS.: 07-154067
07-154094
07-154095

IN THE MATTER OF:

S. A.[1]

Claimant

v.

HALTER MARINE

Employer

and

RELIANCE NATIONAL INDEMNITY CO.

Carrier

APPEARANCES:

JASON EMBRY, ESQ.

For The Claimant

DONALD P. MOORE, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

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[1] Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Claimant against Halter Marine (Employer) and Reliance National Indemnity Co. Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on March 27, 2006, in Covington, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 15 exhibits, Employer/Carrier proffered 17 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That there existed an employee-employer relationship at the time of the alleged accident/injury.

2. That the Employer was notified of the alleged accident/injury on June 10, 1999.

3. That Employer/Carrier filed Notices of Controversion on May 24, 1999, August 19, 1999, and April 14, 2000.

4. That no compensation or medical benefits have been paid to Claimant.

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[2] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer/Carrier's Exhibits: EX-___; and Joint Exhibit: JX-___.

5. That Claimant's average weekly wage at the time of alleged injury was $652.50.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of injury.

2. The nature and extent of Claimant's disability.

3. Whether Claimant has reached maximum medical improvement.

4. The reasonableness and necessity of recommended surgery.

5. Whether Claimant had an intervening injury/accident.

6. Entitlement to and authorization for medical care and services.

7. Whether Employer/Carrier are entitled to special fund relief under Section 8(f) of the Act.

8. Attorney's fees and interest.

III. SUMMARY OF THE EVIDENCE

Claimant was 49 years old at the time of formal hearing. (Tr. 15). He was deposed on April 4, 2000 and July 29, 2005. (EX-17; CX-4, p. 1). He did not complete high school nor obtain a GED, and reads and writes at approximately a third grade level. (Tr. 17; EX-12, p. 17). He testified that he has "trouble with dates," and that dates "get me confused big time." (Tr. 22, 80).

After leaving school, Claimant worked on the family farm milking cows for three or four years. (Tr. 18). In 1975, Claimant obtained a job as a laborer at Struthers Wells, a Gulfport, Mississippi company at which his mother and brother were employed. There, he learned to weld and worked his way up to "fitter welder." (Tr. 18; EX-12, pp. 4-5). During his employment at Struthers Wells, Claimant had an injury to his ankle and was off from work for six weeks. (CX-4, p. 13).

Claimant was employed at Struthers Wells until 1986. (Tr. 18). Thereafter, he was steadily employed as a welder sequentially by four employers in the area, and has never been fired or out of work for a significant period. (Tr. 19-20). Claimant went to work for Employer in the early 1990s when the facility at which Claimant was employed changed hands. (Tr. 19-20).

In 1992, while employed for McDermott, Claimant's neck was injured when he "ran into a piece of pipe." He received workman's compensation and was off work for several months. (CX-4, pp. 14-15). Prior to working for Employer, Claimant can recall only one other incident requiring medical care which was a head injury from an automobile accident that occurred during his employment at McDermott. (CX-4, pp. 15-16).

Claimant contends work-related injuries on three separate occasions in January, April, and June 1999. The dates of the incidents in January and April are approximate as testimony, medical records, and documentation are insufficient to establish the exact timing of the events.

Claimant's testimony and assertions to various doctors contain inconsistent dates and sequence of events. Claimant testified at formal hearing that his left knee was injured in September 1999, but recanted his testimony stating that the injury occurred sometime around January 1999. (Tr. 22).

The January 1999 Incident

On or about January 21, 1999, (EX-1, p. 1), Claimant's left knee became embedded with metal shavings as he was grinding zinc painted metal. The knee eventually became infected. (Tr. 22). Claimant contends he sought care at UrgiCare after Employer medic's treatment was ineffective and swelling had not subsided. (Tr. 22-24). Claimant was treated with medication, and the knee infection apparently resolved. (CX-3, p. 21).

Notice of this injury is disputed. Claimant contends that he informed his foreman, Coot Delancey, and went to Employer's medic. (Tr. 22-24). He further contends that he brought the unpaid medical bill to Danny, Employer's medic, who told him that he did not have a record logged of Claimant's visit concerning his knee. (Tr. 23-24). Employer contends that it

first received notice on April 20, 1999, when Claimant presented his unpaid medical bills. (Tr. 23-24; EX-1, p. 1; EX-2, p. 1). Claimant appears to have lost no work during this event. (CX-5, p. 1).

The April 1999 Incident

The second incident occurred on or about April 26, 1999, when Claimant tripped and fell over angle iron, which may have been on a pallet, and "snapped" his back, causing pain and/or aggravation to Claimant's thoracic spine, lower back, right shoulder and right knee. (Tr. 28, 32; EX-1, p. 3). The fall caused "the air to be knocked out" of Claimant. (EX-8, p. 2). Claimant stated that he informed his foreman, Coot Delancey, who laughed and did not take him seriously. (Tr. 29).

Notice to Employer is disputed, although Employer's First Report of Injury lists the "Date Employer or Foreman First Knew of Accident" as "04/26/99." (EX-1, p. 3). Claimant testified as to medical treatment received which was unsubstantiated by the medical evidence. (Tr. 29-30, 49-50). He stated he was confused with the dates. (Tr. 51). Claimant appears to have lost little to no work time as a result of this incident. (Tr. 32). He stated that since his wife was not working, he felt he must work so he would "take a bunch of medicine and go to work." (Tr. 32).

The June 1999 Incident

The third and most serious incident occurred as a result of work performed by Claimant from Monday, June 7, 1999 through Wednesday, June 9, 1999. (CX-3, pp. 15-16; EX-10, p. 5). Claimant performed welding in a "nose piece," a compartment narrowing down into a small opening, fifteen inches in diameter. (Tr. 33). To get through the openings, Claimant turned and twisted, pulling his legs through. (CX-3, p. 15). Claimant stated that crawling in the small spaces aggravated his knee. (Tr. 34). At the end of the day when Claimant was leaving the work area, he got "hung in the wall" and had to twist and turn in order to free himself. When he exited the work area he was hurting. (Tr. 33).

Claimant presented to UrgiCare, an immediate care facility of Memorial Hospital on Wednesday, June 9, 1999, complaining of "pain back of knee radiating down back of lower leg into foot w/ toe getting numb." (EX-10, p. 5). Employer's First Report of Injury, filed on June 22, 1999, describes the incident as

"crawling through holes in tight spaces all day, causing left knee pain." (EX-1, p. 2). Claimant alleges this incident and the incident in April 1999, are the causes of his shoulder and back pain which became acutely symptomatic in August 1999.

The doctor at UrgiCare stated on June 9, 1999, he believed Claimant pulled some ligaments in the back of his leg, gave him muscle relaxers, and referred Claimant to an orthopedist. (CX-3, p. 16; EX-10, p. 5). Claimant stated at hearing that he was referred to a specialist by his family physician, Dr. Kitchings. (Tr. 25).

On June 15, 1999, Claimant presented to Dr. Hopper at Gulf Coast Orthopedic Clinic for knee pain. Dr. Hopper diagnosed knee pain of undetermined origin, possibly traumatic, and prescribed minimal work on knees for four weeks and physical therapy. (EX-5, pp. 18-19). Claimant stated he gave the paperwork to Employer's medic who told him that he would not be able to work until restrictions were lifted. (Tr. 26; CX-3, p. 18). Claimant underwent physical therapy for the knee from June 17, 1999 through September 8, 1999. (CX-15, pp. 78-103).

On June 21, 1999, Sheila Taylor, a workman's compensation adjuster, took a statement from Claimant via telephone. (CX-3, p. 1). Claimant stated that his knee had been "pretty good" since the initial injury in January 1999, until it began hurting in June 1999. (Tr. 59-60). Claimant stated that no other part of his body was hurting. (CX-3, p. 20-21). When asked if he had any other injuries in between his knee injury in January 1999 and the one on June 7th, Claimant responded "No." (CX-3, p. 21). At formal hearing, when asked why he failed to mention the April 1999 injury to Ms. Taylor, Claimant replied that the dates must be wrong because Ms. Taylor called him "way before my shoulder or anything came about." (Tr. 62).

On July 21, 1999, Dr. Hopper noted Claimant still had some knee discomfort, but was "much better" and released Claimant to resume usual work activities. (EX-5, p. 20). Claimant returned to work on July 22, 1999, using extra knee pads. (Tr. 28; CX-15, p. 104). Claimant related to his physical therapist that his knee began throbbing when he worked in a "hole," but now states that his knee does not bother him as long as he does not crawl on it. If he crawls on it, it hurts. (Tr. 28; CX-15, p. 104). The vocational report prepared by Joe H. Walker and Associates references follow-up medical care at UrgiCare on July 25, 1999, but no other documentation of such care is included in the record. (EX-12, p. 7).

Claimant's Back and Shoulder Conditions

On August 6, 1999, Claimant presented to Employer's medic complaining of sore knees and back pain. (CX-7, p. 3). Claimant again presented to Employer's medic on August 11, 1999, and August 12, 1999, reporting pain in his right arm, left spine, left and right knees. (CX-7, pp. 2, 4). On August 12, 1999, Claimant was sent to OccuMed Gulf Coast Medical Center. (CX-7, p. 6; EX-11, p. 3). Claimant complained of lumbar pain with radiation to his right shoulder. He related to the medical personnel he had "twisted back while at work 4 months ago and has had back pain since then. Pain getting worse past 3 weeks." (EX-11, p. 2). The treatment plan was listed as (1) physical therapy 3 times per week, (2) LS-spine x-ray, (3) follow up in 1 week for re-evaluation. (EX-11, p. 3).

On August 18, 1999, Claimant presented to Gulf Coast Medical Center for follow-up to his visit on August 12, 1999. He had been off from work for one week as directed. He complained of pain starting at his mid-back and radiating to his right shoulder down his arm causing numbness in his right hand. He also complained of pain in his lumbar region radiating down his right leg to posterior right knee. (EX-11, p. 5). Gulf Coast Medical Center personnel noted on August 18, 1999, that Sheila Taylor, Workman's Compensation Adjuster, "said we are not authorized for any more treatment until she sees medical notes. Ms. Taylor said to send patient home." (EX-11, p. 6). Claimant's medical file was noted: "explained to patient no authorization to treat any more today. Patient request neurology consult. Will arrange; he understands this will be on his own account." (EX-11, p. 6).

On August 24, 1999, Claimant presented to Dr. Seidensticker for evaluation of both knees. Dr. Seidensticker, an orthopedist with Gulf Coast Orthopedic Clinic, was a partner of Dr. Hopper who took over Claimant as a patient after Dr. Hopper left on medical leave. (Tr. 48; EX-12, p. 1). Claimant related that he was also having back problems. Dr. Seidensticker observed from x-rays of Claimant's knees: "he does indeed have some lateral tilting of his patellae somewhat more on the left than on the right." Dr. Seidensticker prescribed physical therapy for Claimant's knees and referral to a neurosurgeon for his back. (EX-5, p. 21; CX-12, p. 3). Dr. Seidensticker referred Claimant to Dr. Michael W. Lowry, Neurosurgeon. (CX-10, p. 7).

Claimant presented to Dr. Lowry on September 29, 1999. He conveyed to Dr. Lowry that his problems began in April 1999 when he tripped over something at work and "his back snapped" in the mid-thoracic region. (CX-10, p. 7). He stated that he must crawl through small openings, and has continued to work in pain which flared up when he was moved from one bay (work area) to another. (EX-8, p. 2). Claimant complained of a little pain in his neck, and at times in his right arm, that shoots down to the right elbow and makes the right hand go numb. (CX-10, p. 7). Dr. Lowry ordered an MRI Scan which was done on October 28, 1999. (CX-10, p. 8).

Claimant again presented on November 3, 1999, and stated that his condition was no better. (CX-10, p. 4). Dr. Lowry's review of the MRI found "cervical spine MRI is essentially normal . . . minimal stenosis at C5-6," and "no surgical lesions nor any other pathology that would account for his level of pain." (CX-10, p. 4). Dr. Lowry released Claimant to return to full duty on November 4, 1999. (CX-10, p. 5).

On Monday, November 8, 1999, Claimant presented to UrgiCare complaining of back pain. (CX-11, p. 9). Claimant stated he had "back pain since Aug 12 . . . has seen several MD's, not better." (CX-11, p. 9). The following day, November 9, 1999, Claimant presented to Dr. Seidensticker complaining of pain in his right shoulder and upper back. (EX-5, p. 24). Dr. Seidensticker could not "see anything objectively wrong," prescribed physical therapy, and released Claimant to light work, noting "I would not want him doing any overhead work with his right upper extremity." (EX-5, p. 24).

Claimant returned to work on Wednesday, November 10, 1999, after having been out since August 12, 1999, a period of approximately 3 months. (CX-4, pp. 46-47; CX-7, p. 6).

The following day, Thursday, November 11, 1999, Claimant presented to Rebecca at Employer first aid reporting knee pain. (CX-4, pp. 47-48) Claimant stated "they stuck me back in some real tight holes, and my knee started throbbing real bad." (CX-4, p. 47). Claimant was re-assigned to work at a table standing up for about 1 month and slowly returned to his regular job. (CX-4, pp. 47-48).

Claimant attended physical therapy for his right shoulder and upper back from November 11, 1999, through approximately December 6, 1999, which did not apparently resolve the issue. (CX-15, pp. 66-76). During this period, the physical therapist

documented Claimant's consistent complaints of pain, stating on November 12, 1999: "feels like he has a 'fist' in his back." (CX-15, pp. 66-76). On December 17, 1999, Dr. Seidensticker's nurse noted Claimant "having a lot of shoulder and back pain. He has been to therapy but this has not helped." (EX-5, p. 24). At Dr. Seidensticker's request, the nurse suggested to Claimant that he get another opinion. (EX-5, p. 24).

Claimant stated he was having trouble holding his arms up to weld because of pain. Claimant is right-handed, and would physically hold his right arm up with his left arm when welding overhead. (Tr. 35-36). He continued to work during this time. (Tr. 36-37).

Claimant went to his family doctor, Dr. Kitchings, who referred him to Dr. Ricardo Rodriguez. (Tr. 35). He initially presented to Dr. Rodriguez on January 28, 2000. (EX-6, p. 1). Claimant stated that Dr. Rodriguez also looked at his left knee, but told him that they would address it after the shoulder problem was resolved. (Tr. 45-46). Claimant further testified the knee problem was not thereafter addressed by Dr. Rodriguez because he did not return to work after his shoulder was treated. (Tr. 46). The record reflects Claimant's last day of work for Employer was March 29, 2000, the day before his first shoulder surgery. (EX-17, p. 9; EX-16, p. 11).

Dr. Rodriguez ordered an MRI which was done on February 10, 2000. (Tr. 36; CX-11, p. 3). Claimant was diagnosed as having a "little partial tear or tendonitis." (EX-6, p. 3). Dr. Rodriguez prescribed subacromial injections (steroid shot in area of impingement) and physical therapy. (EX-6, p. 3; EX-16, p. 8).

Claimant was given physical therapy from February 24, 2000, through March 1, 2000. (CX-15, pp. 63-67). He did not respond to the injections and therapy, relating to his physical therapist on March 1, 2000, "he hurts sometimes so much he wants to cry." (EX-6, p. 4; CX-15, p. 63). Dr. Rodriguez reevaluated Claimant's condition on March 13, 2000. (EX-6, p. 4).

Dr. Rodriguez diagnosed Claimant's condition as an "impingement" and prescribed surgery. (EX-6, p. 4). An arthroscopy for evaluation of the rotator cuff and a "decompression" operation was then performed on March 30, 2000, to take the pressure off the rotator cuff to alleviate pain. (EX-16, pp. 9, 11). No tear of the rotator cuff was found. (EX-16, p. 9). Claimant's last day of work prior to surgery was

March 29, 2000. (Tr. 72). At the time of surgery, Dr. Rodriguez anticipated that Claimant would be able to return to regular duty work in 8-12 weeks after surgery. (EX-6, p. 5; EX-16, p. 12).

Claimant presented to Dr. Rodriguez on April 5, 2000, as a post-surgical follow-up. (EX-6, p. 6). Dr. Rodriguez prescribed physical therapy. (EX-6, p. 6). Claimant was again given physical therapy from April 7, 2000, until at least September 27, 2000. (CX-15, pp. 1-62). Initial therapy notes indicate Claimant was instructed to perform Codman's[3] exercises at home. (CX-15, p. 62).

Dr. Rodriguez saw Claimant again on May 10, 2000, and stated Claimant was progressing and healing during this period. (EX-16, p. 12). Dr. Rodriguez noted that Claimant's shoulder motion was good but not yet normal, and Claimant had been diligent about going to his therapy sessions. (EX-16, p. 23).

At some time between May 10, 2000 and May 31, 2000, Claimant suffered an aggravation and/or re-injury of the shoulder, the source of which is the subject of some debate. Claimant thereafter developed "adhesive capsulitis" (stiff shoulder), which is a different condition than impingement for which Claimant was originally treated. (EX-16, pp. 13, 27). Adhesive capsulitis can occur as a complication of surgery. (EX-16, pp. 24, 28). However, in Claimant's case, Dr. Rodriguez opined that the condition was caused by a trauma which Claimant described at his June 26, 2000 examination as slapping water in a pool over Memorial Day weekend. (EX-16, pp. 19, 28-29; CX-8, p. 22). Dr. Rodriguez further opined that, but for the second injury, Claimant would have been able to return to full employment without restriction. (EX-16, pp. 20-21, 30). Dr. Rodriguez stated, based on a reasonable degree of medical probability, Claimant's present work restrictions are related to the "Memorial Day weekend incident," and not Claimant's work injury. (EX-16, pp. 20-21).

[3] Codman's exercises are defined as a careful form of pendulum (side-to-side) movement of the upper extremities, followed by immobilization, with the purpose of regaining/maintaining range of motion after fracture. (*Codman's exercises*, Whonamedit.com, www.whonamedit.com/synd.cfm/3023.html, November 21, 2006).

Second injury/shoulder trauma

Claimant has offered conflicting testimony as to the cause of the second injury or injuries to his shoulder. Claimant's conflicting testimony is addressed in the discussion section below regarding Claimant's credibility. On June 26, 2000, during his visit to Dr. Rodriguez, Claimant stated that progressive worsening began Memorial Day (Monday, May 29, 2000) when he slapped water in a pool while playing splash with his son, and that Claimant "again re-injured it after that." (CX-8, p. 22). At formal hearing, Claimant testified that the therapist suggested he do motion exercises with his arm in a pool. As Claimant was in his pool with his children, his arm was outstretched exercising when his child bumped against it. Claimant stated that the contact was so painful that he fell to his knees. (Tr. 40).

Claimant was taking physical therapy three times per week during May and June 2000. The physical therapist recorded Claimant's comments as follows on the dates indicated.

Monday, May 15, 2000 – "Shoulder is sore this a.m., increased discomfort over the weekend from increased weights."
Friday, May 19, 2000 – "Rolled over on shoulder while sleeping – very sore this a.m."
Monday, May 22, 2000 – "Hurting from cervical to right shoulder; 'feels like I am back to square one'.
Wednesday, May 24, 2000 – "Feels a little stronger."
Friday, May 26, 2000 – "He's been using arm some at home swimming."
Wednesday, May 31, 2000 – "He struck another person's hand in pool by accident – caused severe pain."
Friday, June 02, 2000 - "started taking pain pills again, can't sleep at night / Pt. with increased pain since pool accident"
Monday, June 05, 2000 - "slightly better than last week, can't reach behind back"
Wednesday, June 07, 2000 - "Getting some better - Still a little sore / Pt. not improving. Stated [illegible] about shoulder."
Friday, June 09, 2000 - "Shoulder hurting today"
Monday, June 12, 2000 - "feels much better today"
Wednesday, June 14, 2000 - "Some pain this a.m. [illegible] seems to help"

Friday, June 16, 2000 - "He feels worse today / No MOBS today, Pt. c/o a lot of pain - did not like stretching last therapy - said it hurt too much."
Monday, June 19, 2000 - "not getting better yet, AROM, PROM, sore." [Comments: "AROM, PROM improving."]

(CX-15, pp. 30-45).

Claimant continued in physical therapy. On July 19, 2000, Joseph Frame, PT, noted in a status report to Dr. Rodriguez: "Patient complains of severe pain at end range of flexation . . . He states he is faithful to his home program, however AROM has plateaued." (CX-8, p. 55).

On August 29, 2000, Dr. Rodriguez performed a second surgery to "free up the adhesions and scarring that had developed in the shoulder to regain the motion" and alleviate pain. (EX-16, pp. 13-14; CX-8, p. 13). Thereafter, Claimant achieved "much improved motion," but continued to experience pain. (CX-8, pp. 12, 55). Claimant continued physical therapy. (CX-8, pp. 11-12).

Claimant continued to have pain in his shoulder and neck, radiating into his arm. (CX-8, pp. 8-10). At Claimant's visit on November 6, 2000, Dr. Rodriguez reviewed x-rays but was unable to determine Claimant's source of pain. (EX-16, p. 17; CX-8, p. 10). Dr. Rodriguez referred Claimant to Dr. Sydney Smith of Neuroscience Institute of the Gulf South for evaluation. (EX-9, p. 1).

Claimant presented to Dr. Smith who reported to Dr. Rodriguez on November 30, 2000, his intent to do nerve condition studies of Claimant's lower extremities. (EX-9, p. 3). Dr. Smith related that Claimant's "mental status reveals that he seems to have poor cognitive function." (EX-9, p. 2). Claimant related a history of problems beginning in June 1999. Dr. Smith reported "He says that on '6/10' (by which he means June 10th - he has obviously remembered this since he does not know what month 6 is) he was involved in an accident." (EX-9, p. 1).

Dr. Smith performed neurological tests which suggested "proximal disease in the plexi intraspinal region at approximately L5 and S1." (EX-9, pp. 4-6). Dr. Smith referred Claimant to a neurosurgeon, Dr. Michael Lowry, to determine if myelography might be indicated. (EX-8, p. 7; EX-9, p. 7).

On January 24, 2001, Dr. Lowry reported he had reviewed the "study" of the MRI performed by Dr. Smith, which revealed "mild degenerative changes but none that would cause pain referable to the right arm." (EX-8, p. 7). Dr. Lowry stated "I did consider performing a complete myelogram . . . but quite honestly, I do not want to be involved in his care. He is too upset and too hostile." (EX-8, p. 7). The record does not indicate that a myelogram was ever done.

During March 2001, Claimant followed up with Dr. Seidensticker, and was examined by Dr. Roman Kesler, Neurologist, and Dr. Joe Chen, Pain Management Specialist. (EX-5, p. 24; EX-12, pp. 23-24). On March 28, 2001, Claimant again presented to Dr. Rodriguez. (EX-6, p. 8; CX-8, p. 7). Dr. Rodriguez noted "I'm not sure if there is anything else I can do to make his shoulder better." (EX-6, p. 8; CX-8, p. 7). Dr. Rodriguez then referred Claimant to Dr. Treg Brown, a shoulder surgeon at Tulane University Hospital and Clinic, to determine why Claimant was still having problems. (EX-6, p. 8; EX-16, pp. 17-18; CX-8, p. 7).

Claimant presented to Dr. Treg Brown on April 5, 2001. (CX-9, p. 23). At this time, Claimant reported pain on 10-point scale in his shoulder of 8, and pain in his knee of 5. (CX-9, p. 50). Dr. Brown suspected a partial rotator cuff tear, and performed surgery on Claimant's shoulder on June 19, 2001. (CX-9, pp. 26, 29). Dr. Brown's post-operative diagnosis was impingement syndrome, right shoulder, with mildly inflamed bursa present and no signs of rotator cuff tear. (CX-9, pp. 29-30). After surgery, Claimant returned to physical therapy, and achieved improvement in range of motion and strength. (CX-9, pp. 54, 58, 67).

Claimant's final presentation to Dr. Treg Brown was on December 3, 2001. Dr. Brown noted that Claimant's shoulder was unchanged from his last visit, but markedly improved from pre-operative visits. (EX-7, p. 1; CX-9, pp. 72-73). Dr. Brown noted that he believed Claimant had reached maximum medical improvement with regard to his shoulder. (EX-7, p. 1; CX-9, pp. 72-73). Claimant continued to complain of "giving way" of his knee, for which Dr. Brown recommended follow up with Dr. Rodriguez. (EX-7, p. 1; CX-9, pp. 72-73).

Claimant last presented to Dr. Rodriguez on December 12, 2001. (EX-6, p. 20). Dr. Rodriguez concluded Claimant was at maximum medical improvement and assigned an impairment rating of 15% for his upper right extremity, which correlates to 9% of

whole person, with restrictions of (1) limited overhead work, and (2) lifting no more than 25 pounds repetitively, 50 pounds maximum. (EX-6, p. 9; EX-16, p. 20).

Claimant stated he had inquired about jobs, but has not applied for any since being released by Dr. Rodriguez in December 2001. (Tr. 78). Claimant has been certified in "plus core" and "stick" welding. (CX-4, p. 7). He testified that his shoulder is the principal problem restricting his activities at present, and the knee and back have pretty much resolved such that he could do some work. (Tr. 81).

Claimant stated he could "make change" to a certain amount, but thought he would get fired because of mistakes if he worked handling money. (Tr. 76-77). Concerning his abilities, Claimant testified "I finish a book, but I don't keep none of the knowledge; what I learn, I lose it." (Tr. 17). He further stated "I can just remember up to a short period of time. My memory's - - a lot of it, I lose it." (Tr. 80).

The Medical Testimony

Deposition of Dr. Ricardo Rodriguez

Dr. Rodriguez is a Board-certified Orthopedic Surgeon (EX-16, p. 36). He was deposed by the parties on February 2, 2006. (EX-16, p. 1).

Dr. Rodriguez first saw Claimant on January 28, 2000. Claimant related having injured his right shoulder while climbing through a ship in August 1999. (EX-16, p. 5). Claimant related that he hit his shoulder several times and it was worse the next day. (EX-16, p. 6). Except for the work incident, Claimant did not relate any other history of past shoulder pain or injury. (EX-16, p. 22).

Claimant reported that he saw the medic who referred him to a physician. Claimant went to a clinic in Woolmarket. Physical therapy was unsuccessful and Claimant then saw Dr. Seidensticker. More physical therapy was performed but was unsuccessful. (EX-16, p. 6). Dr. Rodriguez opined that Claimant had a possible rotator cuff tear and cervical disc disease. (EX-16, p. 7).

An MRI revealed "impingement" which is irritation of the rotator cuff and area around it. (EX-16, p. 8). Impingement can be caused by trauma or by the natural aging process. (EX-16, p. 10). Dr. Rodriguez opined, to a reasonable degree of medical probability, that this impingement was caused by trauma to Claimant's shoulder. (EX-16, p. 22).

On February 1, 2000, a "subacromial injection" (steroid shot) was done in the area of the impingement. (EX-16, p. 8). Claimant again presented on March 13, 2000, at which time his shoulder was still very painful. (EX-16, p. 9). Dr. Rodriguez then did an arthroscopy of his shoulder that did not reveal a tear of the rotator cuff. (EX-16, p. 9). Dr. Rodriguez diagnosed the problem as an impingement and a "decompression" surgery was then performed on March 30, 2000, to take the pressure off the rotator cuff to alleviate pain. (EX-16, pp. 9, 11). At that time, Dr. Rodriguez anticipated Claimant would be able to return to regular duty work. (EX-16, p. 12).

Claimant was in physical therapy immediately following surgery. (EX-16, p. 23). Dr. Rodriguez saw Claimant again on April 2, 2000 and May 10, 2000. At those visits, Claimant was progressing and healing. (EX-16, p. 12). Dr. Rodriguez noted on May 10, 2000, that Claimant's shoulder motion was good but not yet normal. Claimant had been diligent about going to his therapy sessions. (EX-16, p. 23).

Dr. Rodriguez saw Claimant again on June 26, 2000. Claimant stated he re-injured the shoulder when he was playing in a pool and again during a later incident which Dr. Rodriguez did not recall. (EX-16, pp. 12-13). Thereafter, Claimant's symptoms increased. (EX-16, p. 13). Claimant had not reached maximum medical improvement from the first surgery at the time the second incident occurred. (EX-16, p. 29). Dr. Rodriguez had not limited Claimant's shoulder motion after this surgery because "we want them to work it and get it going again." (EX-16, pp. 28-29).

Claimant then developed "adhesive capsulitis," which is a "stiff shoulder." (EX-16, p. 13). This condition can develop as a result of trauma, spontaneously, or as a result of surgery. (EX-16, p. 24). Dr. Rodriguez believes that in this case it is not a complication of the surgery because Claimant showed progress after surgery. (EX-16, p. 25). The first condition, which prompted the first surgery was "impingement" which is irritation of the rotator cuff and the area on top called the subacromial space. (EX-16, pp. 26-27). Claimant still had good

motion of the shoulder, although extremes of motion would hurt. (EX-16, p. 27). The second condition, "stiff shoulder," results in a very limited range of motion because of scarring and inflammation. Motion is very painful with a stiff shoulder, which is a different condition from "impingement." (EX-16, pp. 27-28).

Had the second incident not occurred, Dr. Rodriguez would have expected Claimant to remain on light duty restriction for three to six months, and then resume full work with no restrictions. (EX-16, pp. 29-30). Dr. Rodriguez expected Claimant to make a full recovery after his first surgery. He opined to a reasonable degree of medical probability that Claimant's present work restrictions are the result of the incident on Memorial Day. (EX-16, p. 21).

Dr. Rodriguez performed another surgery to "free up the adhesions and scarring" and "debride any scar tissue" to alleviate pain and maintain motion. (EX-16, pp. 13-15). Dr. Rodriguez next saw Claimant on September 6, 2000 and November 6, 2000 to follow-up after surgery. Claimant was having shoulder pain into his hand which is not typical of shoulder pain. (EX-16, p. 16). Dr. Rodriguez opined that Claimant's pain may be referred pain from a neck issue and not the shoulder problem. (EX-16, p. 17). Dr. Rodriguez took x-rays which failed to show a problem, and referred Claimant to Dr. Brown at Tulane University Hospital and Clinic on March 28, 2001. (EX-16, pp. 17-18).

Dr. Brown performed an MRI on Claimant's shoulder on May 4, 2001. (EX-16, p. 18). The test showed a small tear in Claimant's rotator cuff, but a later "scope" did not reveal a tear. (EX-16, pp. 18-19). Dr. Brown referred Claimant back to Dr. Rodriguez for complaints of "giving way in his knee." (EX-16, p. 32).

The Vocational Evidence

Claimant was initially interviewed on Monday, April 14, 2003, by Joe H. Walker, Vocational Consultant. Mr. Walker issued an initial vocational report on April 21, 2003, and a supplemental Labor Market Survey on May 9, 2003. (EX-12, pp. 1, 15).

Mr. Walker, after review of Claimant's extensive medical history, lists permanent work restrictions as: (1) limited overhead work and (2) lifting no more than 25 pounds

repetitively and maximum 50 pounds. (EX-12, p. 11). Claimant is right-hand dominant. (EX-12, p. 2). Additionally, Claimant denies being able to perform activity associated with crawling, squatting, kneeling, and ladder climbing, because of right shoulder and bilateral knee symptoms, and complains of low back symptoms. (EX-12, p. 11). However, no permanent restriction associated with knee problems was imposed by doctors. (EX-12, pp. 11, 25). Therefore, restrictions for knee and back problems were not included in task restrictions. (EX-12, p. 25). The record does not indicate that a functional capacity evaluation was ever performed.

Additionally, Mr. Walker noted Claimant's limited mental ability, stating "it is my impression that [Claimant] has an educational learning disability." (EX-12, p. 12). With restrictions as outlined by Dr. Rodriguez, Claimant is unable to return to a full range of work activity, as he has previously performed in the past. (EX-12, p. 12).

The labor market survey was based upon restrictions imposed by Dr. Rodriguez of "limited overhead work and lifting of no more than 25 pounds repetitively and maximum of 50 pounds." (EX-12, pp. 24-25). Only jobs "where reading and writing activity, beyond marginal and/or elemental levels, where not required as essential functions of the position" were considered. (EX-12, p. 25). Welding positions within the capabilities of Claimant were considered. However, none were available in the relevant community. (EX-12, pp. 25-26).

The relevant community was defined as the Biloxi/Gulfport, Mississippi area and Long Beach, Mississippi area. (EX-12, p. 15). The following job opportunities were identified as suitable for a person with Claimant's restrictions as stated above:

1. Buffet (Food Line) Server at Piccadilly Restaurant, Gulfport, MS, was currently available and available on December 12, 2001, at a starting wage of $6.00 per hour, 40 hours per week. Physical requirements are considered modified light to medium activity without overhead activity, but with reaching, carrying, standing and walking. Duties consist of serving from a steam table of various foods. Neither reading tasks nor high school credential are required. (EX-12, p. 26)

2. Kitchen Helper in a hospital or restaurant settings. A position was currently available at a starting wage of $6.00 per hour, 40-hours per week. Physical requirements are modified light to medium activity without overhead activity, but with reaching, carrying, standing and walking. Duties consist of washing and storing cooking utensils, cleaning, sweeping and moping. No overhead work, reading, or high school credential were required. (EX-12, pp. 25-26).

3. Housekeeper in a casino setting. Positions were currently available and available on December 12, 2001, at starting wage of $6.00 per hour, 40-hours per week. Physical requirements are modified light - medium activity without overhead activity, but with reaching, carrying, standing and walking. Duties consist of collecting empty beverage containers, coin wrappers, emptying ashtrays, and cleaning the areas around slot machines. Reading tasks and a high school credential are not required for performance of essential duties of the position. (EX-12, pp. 27-28)

4. Pizza restaurant kitchen helper and food delivery drivers. These positions are 40 hours per week. Entry wages are $5.15 per hour plus tips. Physical requirements are considered modified light, primarily standing and walking. Duties consist of delivering pizzas, operating a vehicle, and receiving payments. Reliable transportation and liability insurance is required. (EX-12, p. 28).

5. Car Wash Attendant positions are periodically available. Entry wage is $5.25 per hour working 15 hours for the first week and 30 hours or more per week thereafter. Physical requirements are considered light to medium activity without (right upper extremity) overhead work, with reaching, carrying, standing, walking, squatting, bending and stooping. Mr. Walker believes Claimant could perform the needed tasks of vacuuming cars, cleaning windows, tires, and drying cars using his left hand. Reading tasks and a high school credential are not required for the essential duties of this position. (EX-12, p. 28).

6. Additional job opportunities information from the State of Mississippi, Labor Market Information 2001 Occupational Employment and Wage Estimates of Biloxi, Gulfport and Pascagoula MSA are listed without specific job duties. (EX-12, p. 29).

The Contentions of the Parties

Claimant contends that he sustained three compensable injuries. The first injury to his left knee on approximately January 21, 1999, the second injury to his back in April 1999, and the third to his right shoulder in June 1999. Claimant further contends that he did not suffer a supervening event to break the causal connection between his employment and his injuries, and that his permanent work restrictions render him permanently unable to perform his prior employment.

Employer/Carrier contend that Claimant's testimony is incredible, and he has failed to establish that any of his conditions are the result of a work-related accident or injury, alternatively that his present work restrictions are the result of an intervening accident occurring on or about May 31, 2000, Memorial Day. Employer/Carrier further contend that they were not timely informed of Claimant's injuries in January 1999 and April 1999, and they were prejudiced by the lack of notice. Alternatively, they contend that Claimant was released to return to work full duty for each injury and is therefore not permanently disabled. Employer/Carrier further contend they are not responsible for Claimant's unauthorized medical treatment, and are entitled to Second Fund relief.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

Claimant's Credibility

As Employer/Carrier correctly observed, Claimant's testimony at hearing, deposition, and history as stated to various health care professionals contains multiple inconsistencies. While such inconsistencies may lead to a conclusion of incredibility and/or intentional misrepresentation of fact, such is not always the case.

Claimant lacks formal education and has an apparent learning disability. Claimant quit school in the seventh grade, after being socially promoted or "passed along" to that level. He describes reading and writing ability at about a third grade level. After interviewing Claimant, Joe Walker, Vocational Consultant, concluded Claimant has an educational learning disability.

Dr. Sydney Smith noted from his neurologic examination of Claimant that "mental status reveals that he seems to have poor cognitive function." Claimant also testified as to his inability to remember and confusion with dates. Claimant testified at formal hearing: "[dates] get me confused big time." and "I can just remember up to a short period of time. My memory's - - a lot of it, I lose it."

Claimant's testimony is indeed rife with inconsistencies, especially concerning dates and sequence of events. An example of this is Claimant's testimony at formal hearing concerning the time of his first shoulder operation.

Medical evidence verifies Claimant had three shoulder operations on March 30, 2000, August 29, 2000, and June 19, 2001. When asked when his first operation was done, Claimant stated "That was in '99 . . . no, 2001." Then when led by counsel, Claimant stated "2000. It was in 2000." (Tr. 37).

Claimant had no apparent motive to attempt to misrepresent the timing of his first shoulder surgery, but was apparently confused.

Although Claimant's testimony regarding the timing and sequence of events is clearly flawed, Claimant's testimony as to the substance of events is often supported by other evidence. An example of this is found in Claimant's testimony concerning Employer's refusal to allow Claimant to work under restrictions assigned by Dr. Hopper on June 15, 1999.

The medical record and payroll records support the facts that Dr. Hopper imposed medical restrictions of "minimal work on knees for four weeks" on June 15, 1999. (EX-5, p. 19). The payroll records reflect no or minimal work by Claimant for pay periods ending 6/18/1999 through 7/23/1999. (CX-5, p. 3). The contention that Claimant was not allowed to work because of the medical restriction is uncontested by Employer.

In his statement to Sheila Taylor on June 21, 1999, Claimant conveyed Employer's refusal to allow him to work under a restriction of "minimal work on knees" in relation to his knee injury on June 7, 1999. (CX-3, p. 18). However, at formal hearing, Claimant recounted this refusal by Employer during direct questioning regarding the January 1999 injury. (Tr. 25-26). Clearly, Claimant recounted the event consistently, but during hearing was confused about the time that Employer's refusal to allow him to work under restriction occurred.

Claimant's correct description provided to Sheila Taylor in June 1999 is consistent with Claimant's own statement that he can remember only for a short period of time, particularly regarding dates. Still, the substance of the event as conveyed in Claimant's testimony at formal hearing was consistent with the original statement and other evidence.

Although Claimant may have an earnest desire for truthfulness, his ability to communicate effectively is clearly limited, especially with regard to dates and the sequence of events. Claimant's testimony alone regarding dates and the sequence of events clearly cannot be relied upon. However, Claimant's testimony is not wholly implausible since the substance of events conveyed is credible.

Accordingly, I find and conclude that Claimant's testimony is partially credible because of Claimant's apparent limited ability to communicate. I credit Claimant's testimony to the extent it is corroborated by other evidence or by reasonable inference supported by other evidence.

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary- that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm

or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

Claimant contends that he sustained compensable injuries to his left knee, back, neck and shoulder, while Employer/Carrier contend that these conditions are not related to Claimant's employment. Employer/Carrier contend that the only evidence establishing a connection to employment is Claimant's incredible testimony.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

In the present matter, medical and other evidence supports a finding of injury to Claimant's knee, back/neck, and shoulder. Claimant alleges the injuries occurred in January, April, and June 1999. The medical record reflects that Claimant's shoulder and back injuries became symptomatic in August 1999. Each will be addressed in turn.

January 1999

Claimant alleges that in January 1999, his knee became infected as a result of metal shavings embedded in the knee. In his statement to Sheila Taylor on June 21, 1999, he relates that he presented to Employer's medic prior to seeking other medical care. He next presented to "UrgiCare" and was referred to Memorial Hospital where he was prescribed antibiotics, pain pills, and muscle relaxers. He states the swelling subsequently subsided. The payroll record does not indicate lost work time. Claimant subsequently referenced the event to various doctors. Employer/Carrier contend they were not timely notified of this event, and the LS-202, Employer's First Report of Injury, shows the date of Employer's first knowledge as April 20, 1999.

As noted earlier, Claimant is a poor historian, particularly with regard to dates and sequence of events. Claimant's testimony will be credited only if supported by other evidence or a reasonable inference drawn from other evidence. The record is devoid of any medical records documenting treatment of Claimant's knee in January 1999 at Urgicare or Memorial Hospital.

Accordingly, I find that Claimant has failed to demonstrate by credible evidence that he sustained a physical harm or pain in January 1999 and therefore he has failed to establish a **prima facie** case of compensable injury.

April 1999

Claimant contends that on April 26, 1999, he tripped on angle iron causing injury to his back, right shoulder and right knee. Like the incident in January 1999, the record is devoid of evidence other than Claimant's testimony and statements to his various doctors to support his contentions regarding this event. There is no documentation of medical treatment in the record occurring in April 1999 for this injury although later medical records reference this event in Claimant's history.

Employer/Carrier contend that they were not timely notified of the injury. Form LS-202 dated August 12, 1999 states April 26, 1999 as the date of first knowledge, although this may be a typographical error.

For the same reasons stated above, I decline to accept Claimant's unsubstantiated testimony regarding this event. Accordingly, I find that Claimant has failed to establish by credible evidence that he sustained a physical harm or pain on April 26, 1999, and he has failed to show a **prima facie** case of a compensable injury.

June 1999

Claimant contends injury to his knee, back/neck, and shoulder when he was crawling through small "holes" which were his assigned work area. Claimant stated on June 21, 1999, that he presented to Employer's medic on Monday, June 7, 1999, and was told to return the following day. He stated that by Wednesday, June 9th, his knee was "aching real bad" and he again presented to the medic who told him to go to the doctor. The medical record indicates that Claimant presented to "UrgiCare" on June 9, 1999, and Employer filed Form LS-202 on June 22,

1999. Claimant later stated to Dr. Smith that he developed shoulder pain and difficulty holding his right arm up.

Claimant's account of a knee injury in June 1999, is supported by the medical record and consistent with later testimony. Therefore, I credit Claimant's testimony regarding this incident. Accordingly, I find that the knee injury sustained June 9, 1999, constitutes an injury under the Act, and that Claimant's working conditions and activity on that date could have caused the harm.

August 1999

Employer's Daily First Aid Reports indicate that Claimant presented to Employer's medic on August 6, 11, and 12, 1999, with complaints of left spine, right shoulder, and knee pain. On August 12, 1999, Claimant presented to OccuMed with complaints of back and shoulder pain, noting deterioration of ROM [range of motion] since he was crawling through narrow spaces in June 1999.

Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra at 147-148.

An injury under the Act may be the result of cumulative activity. See Kelaita v. Triple A Machine Shop, supra, in which the Board found that the cumulative effect of prior "lifting, pushing, pulling and carrying heavy objects" could constitute working conditions which could have caused the injury.

It is noted that Claimant's symptoms in June and August 1999, may be the result of aggravation of pre-existing conditions or a cumulative effect of prior work activity which were rendered symptomatic on those dates, as opposed to new independent injuries. Claimant's working conditions prior to and on those dates clearly could have caused the aggravation.

Working conditions of crawling through fifteen inch openings and consistent need for working on one's knees as described by Claimant were not controverted.

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain to his knee, back/neck and shoulder on June 9, 1999, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986).

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Employer/Carrier contend that the presumption of work-related injury is rebutted in that: (1) Claimant's testimony is incredible, and Claimant's own denial of pain due to back and shoulder injuries in an interview with Sheila Taylor, workman's compensation representative, on June 21, 1999, effectively rebuts a finding of causation for injury to Claimant's back and right shoulder; (2) Claimant's testimony of reporting to Employer's first aid facility in January 1999, prior to obtaining treatment for his left knee, in April 1999 and June 1999, is rebutted by the absence of documentation in Employer's records; (3) Claimant did not seek medical attention for supposed injuries sustained in April 1999, until August 1999; and (4) no medical evidence exists finding anything objectively wrong with Claimant's left knee. Each of these will be addressed in turn.

Claimant's June 21, 1999 statement to workman's compensation representative

Claimant's testimony is in fact rife with inconsistencies and clear errors as to timing and sequence of events. Employer/Carrier note in brief the difficulty that Claimant's inconsistent testimony presents stating "if Claimant cannot recall or consistently provide a history of his alleged injuries, then how is the Employer supposed to investigate and corroborate his alleged injuries." It is noted that Claimant's inconsistent testimony provides a heightened burden on Employer/Carrier, however, inability of Claimant to supply a clear history of events, alone, is not a bar to entitlement.

Claimant contends that on June 7, 1999, he injured his knee, shoulder, and back while crawling through small openings in his work area. He contends that he presented to Employer's

first aid facility on that date, and again on June 9, 1999, at which time he was referred to UrgiCare, where he was in turn referred to Dr. Hopper for his knee.

Employer/Carrier point to a telephone interview of Claimant conducted by Sheila Taylor, Workman's Compensation representative, on June 21, 1999, in which Claimant stated that no other part of his body, other than his knee, was hurting. The interview was only two weeks after the incident which allegedly involved Claimant's knee, back, and shoulder. Therefore, Employer/Carrier contend, Claimant's contention that back and shoulder problems are causally related to work activity is effectively rebutted.

The record, aside from Claimant's testimony, contains medical documentation as follows. Claimant presented to UrgiCare on June 9, 1999, complaining only of knee pain radiating down back of leg into foot. On June 15, 1999, Dr. Hopper prescribed minimal knee work for four weeks. On July 21, 1999, Dr. Hopper released Claimant to resume work, which he apparently did on July 22, 1999.

Claimant presented to Employer's first aid facility on August 6, 11, and 12, 1999, the second and third weeks after he returned to work. Although some of Employer's "Daily First Aid Report" are illegible, it is clear that on August 12, 1999, Claimant presented with complaints involving all three areas, left spine, shoulder, and knee pain. The August 12th log notes that Claimant's pain related to "4/26/1999." It is uncontroverted by Employer/Carrier and uncontested in the medical record by any of Claimant's physicians that Claimant did crawl around small spaces, and that injury incidental to that activity, such as bumping one's limbs, twisting, turning, etc., could have resulted in Claimant's conditions, i.e. knee, right shoulder, and back pain.

It should be noted that Claimant's contention that the injuries to his shoulder and spine are related to a fall on April 26, 1999, does not arguably need to be precise in date for the injury to constitute a compensable injury. Having made a **prime facie** case, Employer/Carrier must show that the working condition neither caused nor aggravated, accelerated or rendered symptomatic the injury.

Here, Claimant alleged events on April 26, 1999, and June 7, 1999, and a regular working condition that could have caused the harm which became manifest on or about August 6, 1999. As

noted earlier, Claimant is a poor historian. The fact that Claimant failed to mention back or shoulder pain in June 1999, is useful in affixing the time of the injury, but is not sufficient to overcome the presumption established by Claimant's **prima facie** case.

When something unexpectedly goes wrong within the human frame, there has been an "injury" according to the Act. See Wheatley v. Alder, 407 F.2d 307 (D.C. Cir. 1968). Claimant's pain and knee, back, and shoulder conditions which became symptomatic in August 1999 is sufficient to meet this standard.

Assuming, **arguendo**, that Claimant's symptoms on or about August 6, 1999 were the result of aggravation to a non-work-related prior injury, the fact that the condition was rendered symptomatic by working conditions, even if working conditions existed only on that day, makes it compensable. Further, the fact that Employer's records recognize presentation by Claimant to its first aid facility on three occasions within two work weeks for symptoms which could have been related to work activity that Claimant was currently performing is sufficient to establish a presumption of causation, even absent any assertion by Claimant that the injury occurred on that date.

Accordingly, I find that the presumption of work-related injury to his knees as of June 7, 1999, has not been rebutted by Employer/Carrier. Additionally, I find that although Employer/Carrier has not rebutted the presumption of causation as to Claimant's back and right shoulder injuries, they have effectively rebutted Claimant's assignment of the date of such compensable injury. Accordingly, I find that compensable injury to Claimant's back and right shoulder took place as of August 6, 1999.

Employer's first aid facility records and timing of medical attention

Employer/Carrier contend that the presumption of causation of compensable injuries is rebutted because Claimant's testimony of presentation to Employer's first aid facility in January 1999, April 1999, and June 1999 is absent from Employer's records. Also, the fact that Claimant did not seek medical attention for alleged injuries to his back and shoulder until August 1999 effectively rebuts the fact of injury.

As stated earlier, since Claimant's testimony regarding the events in January and April 1999, is unsupported by other evidence, these events were found to not give rise to a compensable injury. Therefore, rebuttal of causation for these events is moot.

Likewise, the assignment of specific dates of injury of June 7, 1999 and August 6, 1999 is based on evidence other than Claimant's unsubstantiated testimony. The absence of documentation supporting Claimant's alleged presentation to Employer's first aid facility and timing of Claimant's pursuit of medical attention is also useful in establishing timing, but does not carry probative weight sufficient to overcome the presumption created by Claimant's **prima facie** case.

Therefore, I find this argument is insufficient to rebut the presumption of causation in this case.

Objective evidence of knee injury

Employer/Carrier contend that no medical evidence exists finding anything objectively wrong with Claimant's left knee. Therefore, fact of injury and presumption of causation are effectively rebutted.

The medical record does not support this argument. Also, in this regard, Claimant's record testimony and statements to medical care providers are consistent in that knee pain did exist and never fully resolved. The record indicates persistent pain in Claimant's knee that apparently is not being treated.

Dr. Hopper released Claimant to full duty on July 21, 1999, following Claimant's knee injury on June 7, 1999. However, at some time between July 22, 1999 and August 26, 1999, Claimant related to his physical therapist that when he returned to work on July 22, 1999, he "went into a hole" working on a plate, and his knee started throbbing.

A similar incident occurred on Thursday, November 11, 1999, the day after Claimant returned to work after an absence of approximately three months. At Claimant's deposition on April 4, 2000, Employer's Counsel refreshed Claimant's memory from notes in Counsel's file, that Claimant was released on November 10, 1999 to return to work, and that he reported knee pain the next day. Claimant stated he presented to Employer's first aid

facility because "they stuck me back in some real tight holes, and my knee started throbbing real bad." Claimant reported he was re-assigned to work at a table standing up for about 1 month.

Claimant reported a knee pain level of five on a ten-point scale when he reported to Dr. Treg Brown on April 5, 2001, and to Joe Walker, a vocational consultant on April 3, 2003. Claimant related an inability to perform activity associated with crawling, squatting, kneeling, and ladder climbing, because of right shoulder and bilateral knee symptoms. Finally, at formal hearing Claimant testified his knee does not bother him as long as he does not crawl on it. If he crawls on it, it hurts.

Therefore, the record does indicate that Claimant has persistent, unresolved knee problems. I find the fact that Claimant was released by Dr. Hopper after treatment for his knee problems, and his knee problem has not been treated further does not rebut the presumption of causation or fact of injury.

Based on the foregoing, I find and conclude that Employer/Carrier have not introduced substantial evidence sufficient to rebut Claimant's **prima facie** case.

3. Weighing All the Evidence

Assuming, **arguendo**, that Employer/Carrier provided sufficient evidence to rebut Claimant's **prima facie** case, I will proceed to weigh all the record evidence.

Injuries which may have occurred on January 21, 1999, and April 26, 1999, were found above not to constitute compensable injuries within the purview of the Act. Therefore, they are not considered in weighing the record as a whole.

Claimant contends that the present injuries to his back, shoulder, and knees are causally related to events of June 7, 1999, which he described to Sheila Taylor as "going through a lot of real tight holes . . . turning and twisting." Claimant also contends that his work duties required him to crawl in such small spaces on several occasions other than June 7, 1999. It is uncontroverted by Employer/Carrier that Claimant was required to crawl through small spaces in the course of his employment.

Claimant has recounted the event of crawling through small openings to his doctors. He has on occasion added the details of hitting arms/shoulders, twisting and turning, or getting "hung up." Such twisting or impact seems a logical consequence of crawling through small openings, and Employer/Carrier has not controverted such. Neither Dr. Rodriguez nor any of Claimant's other doctors have questioned these events as being capable of causing Claimant's conditions.

Claimant received medical attention for his knee promptly after June 7, 1999. Objective medical evidence and physical therapy notes document injury to Claimant's knee at that time. The final physical therapy note for Claimant's knee on September 8, 1999, notes moderate pain in Claimant's left knee.

Claimant did not, however, seek medical attention for his back or shoulder until August 6, 11, and 12, 1999, when he presented to Employer's first aid station. Thereafter, Claimant continued to complain of his knee, back, and shoulder to a variety of doctors. In Dr. Smith's report to Dr. Rodriguez, Claimant reported that some time after the June event he "began to notice difficulty holding his right arm up . . . pain in the arm." Claimant's back and shoulder apparently became symptomatic, or symptomatic to the point that Claimant could no longer function, in August 1999, when he presented to Employer's first aid station. Therefore, Claimant's work-related activity and timing, in which Claimant's injuries became symptomatic, are consistent with a causal relationship.

Claimant has offered no non-work-related event history to his doctors that could have caused the injury prior to his first shoulder surgery. After Claimant's first shoulder surgery, he suffered a setback due to an incident in a swimming pool which is discussed below. Employer/Carrier have not shown that the work-related conditions and events were not capable of causing Claimant's injuries, nor have they shown a non-work-related cause other than the pool incident discussed below.

Weighing all of the evidence, I find that the preponderance of evidence indicates that injury to Claimant's back, knees, and right shoulder are causally related to working conditions. Therefore, absent an intervening or supervening cause or bar to recovery, Claimant has established his entitlement to benefits under the Act.

4. Intervening or Supervening Cause

Employer/Carrier contend that a pool accident occurring over Memorial Day 2000 weekend constituted a supervening cause sufficient to sever the causal relationship between Claimant's injuries and work-related events.

Dr. Rodriguez opined that, but for the injury in the pool, Claimant would have made a full recovery, would not have required a second or third shoulder surgery, and would have been capable of resuming his regular job. Further, Dr. Rodriguez believes that the initial operation did not weaken Claimant's shoulder or make it more vulnerable to injury. Therefore, if the pool event, which caused the secondary injury, constitutes a supervening event, it would sever the causal connection between the injury to Claimant's right shoulder and the work-related events. These events involving Claimant's shoulder will not affect Employer/Carrier's liability with regard to Claimant's back and left knee.

Not surprisingly, Claimant's testimony concerning the facts of these events is inconsistent. As noted earlier, Claimant is, indeed, a poor historian. The Memorial Day weekend in question was from Saturday, May 27, 2000 through Monday, May 29, 2000. It is noted from comparisons between events related by Claimant to his doctors to events related to Sheila Taylor on June 21, 1999, that the closer in time Claimant's account of an event is to the actual event, the more accurate Claimant's account seems to be.

Dr. Rodriguez examined Claimant's shoulder on May 10, 2000, finding motion in the shoulder "very good" but "not normal yet." Dr. Rodriguez released Claimant to light duty work. At his next appointment on June 26, 2000, Claimant told Dr. Rodriguez that he began having discomfort about Memorial Day when he slapped the water while playing. Dr. Rodriguez also noted that Claimant re-injured his shoulder after that, but did not remember any details at deposition.

Dr. Rodriguez's deposition was taken on February 2, 2006, approximately four years after Dr. Rodriguez last saw Claimant. The record reflects the last visit of December 12, 2001, as a follow-up after the operation by Dr. Brown, whereas Dr. Rodriguez's depositions states the last time he saw Claimant was March 28, 2001. Dr. Rodriguez referred to his notes often and seemed to remember little that was not in his notes.

Claimant's first shoulder operation was on March 30, 2000, after which he underwent physical therapy. Claimant testified at formal hearing that therapy was painful even before the pool incident, which is confirmed by the physical therapy notes (see Summary of the Evidence). Claimant testified at hearing that the incident occurred when Claimant's child bumped against his outstretched arm as he was doing exercises as instructed by the physical therapist.

Physical Therapy records confirm that Claimant had been instructed to do Codman's exercises of his upper body at home. Claimant's physical therapist noted "He's been using arm some at home swimming" at the session on May 26, 2000, immediately prior to Memorial Day. The therapist noted on May 31, 2000, immediately after Memorial Day that "He struck another person's hand in pool by accident – caused severe pain." Finally, in a "Current Status Report" dated June 26, 2000, Joseph M. Frame, physical therapist, assessed Claimant's status as "Regression . . . **since striking hand** in pool [emphasis as indicated on hand written original]."

Dr. Rodriguez testified that Claimant was not under post-surgery restrictions of movement of his shoulder. As Dr. Rodriguez testified "We want them to work it and get it going again." Dr. Rodriguez also noted that Claimant was diligent about going to therapy sessions.

The physical therapist notated on the visit immediately prior to Memorial Day that Claimant was using his arm at home for swimming. From this, one may reasonably infer that the activity that Claimant was doing in the pool when the accident occurred was Codman's exercises as instructed by the physical therapist, or at a minimum, the activity was endorsed by the therapist. If the physical therapist knew about the activity and thought it to be improper, arguably he would have informed Claimant to cease such activity. Since the therapist knew that the activity was taking place at "home," contact with other family members would have been reasonably foreseeable and a warning against such contact would have been in order, if harmful. However, the record does not reflect any warning, instructions by the therapist for Claimant to consult his physician, nor any concern by the therapist over the activity. The clear indication is that the physical therapist knew of the activity and did not restrict, but rather encouraged it.

Claimant's testimony as to substantive events is not wholly incredible, but lacks credibility as to sequence and date. Here, Claimant's testimony as to the circumstances surrounding the pool incident is supported by other evidence and reasonable inferences drawn from other evidence. Additionally, Claimant's version given to the physical therapist is arguably the correct account since Claimant gave the account within one week after the incident occurred.

Accordingly, I find that as a matter of fact that Claimant sustained a aggravation of his work-related injury at some time between Saturday, May 27, 2000 through Monday, May 29, 2000. I further find that the accident (hereinafter the pool incident) occurred while Claimant was involved in activity that was likely prescribed, and at a minimum encouraged by Claimant's physical therapist, thus constituting part of Claimant's medical treatment for the primary injury.

If there has been a **subsequent non-work-related injury or aggravation**, the Employer/Carrier are liable for the entire disability **if** the second injury or aggravation is the natural or unavoidable result of the first injury. Atlantic Marine v. Bruce, supra; Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954)(if an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986).

If, however, the subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is the result of an intervening cause such as the employee's intentional or negligent conduct, the employer is relieved of liability attributable to the subsequent injury. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT)(5th Cir. 1983); Colburn v. General Dynamics Corp., 21 BRBS 219, 222 (1988).

Where there is no evidence of record which apportions the disability between the two injuries it is appropriate to hold employer liable for benefits for the entire disability. Plappert v. Marine Corps Exchange, 31 BRBS 13, 15 (1997), aff'd 31 BRBS 109 (en banc); Bass v. Broadway Maintenance, 28 BRBS 11, 15-16 (1994).

Moreover, if there has been a subsequent non-work-related event, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that Claimant's condition was caused by the subsequent non-work-related event; in such a case, employer must additionally establish that the first work-related injury did not cause the second injury. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989).

The U.S. Fifth Circuit Court of Appeals has set forth "somewhat different standards" regarding establishment of supervening events. Shell Offshore, Inc. v. Director, OWCP, 122 F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997). The initial standard was set forth in Voris v. Texas Employers Ins. Ass'n., which held that a supervening cause was an influence originating entirely outside of employment that overpowered and nullified the initial injury. 190 F.2d 929, 934 (5th Cir. 1951). Later, the Court in Mississippi Coast Marine v. Bosarge, held that a simple "worsening" could give rise to a supervening cause. 637 F.2d 994, 1000 (5th Cir. 1981). Specifically, the Court held that "[a] subsequent injury is compensable if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause." The Board has interpreted this standard holding that "in order to break the causal connection, the intervening cause must be (1) due to the intentional conduct of claimant or a third party, or (2) to the negligent conduct of claimant or a third party **and** this negligent conduct must have had no relationship to the primary injury or to claimant's employment." Wheeler v. Interocean Stevedoring, Inc., 21 BRBS 33 (1988).

However, the Board has held that medical treatment of a work-related injury, even to the point of malpractice, does not break the causal nexus. Wheeler, supra, citing 1 A. Larson, Workmen's Compensation Law, § 13.21 (1987). Additionally, the Board also recognized "when claimant's conduct in seeking treatment and his choice of doctor are reasonable under the circumstances claimant may receive disability benefits for any increased disability due to failed surgery." Wheeler, supra, citing 1 A. Larson, Workmen's Compensation Law, § 13.24 (1987).

I have found the pool incident to have occurred in the course of medical treatment for the primary injury. There is no evidence that the incident was the result of intentional conduct on the part of Claimant or a third party. Claimant's conduct was in conformity with instructions and/or lack thereof issued by his treating surgeon, Dr. Rodriguez, and treating physical

therapist. Accordingly, I find that neither Claimant's choice of physicians nor conduct concerning the pool incident constitute negligent conduct unrelated to Claimant's primary injury.

Assuming, **arguendo**, that the pool incident did not occur in the course of medical treatment for the primary treatment, it was nonetheless a reasonably foreseeable event under the medical instructions given to Claimant by both his surgeon and physical therapist. Therefore, the pool incident was a natural or unavoidable result of the first injury.

Based on the foregoing, I find that the pool incident does not constitute a supervening cause sufficient to sever the causal relationship between Claimant's injuries and work-related events

5. Timely Notice Under Section 12(a)

Section 12(a) of the Act provides that notice of an injury or death for which compensation is payable must be given within 30 days after injury or death, or within 30 days after the employee or beneficiary is aware of, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of, a relationship between the injury or death and the employment. It is the claimant's burden to establish timely notice. See 33 U.S.C. §912(a).

Failure to provide timely notice of an injury, as required by Section 12(a), bars a claim unless it is excused under Section 12(d) of the Act. Pursuant to Section 12(d), the failure to provide such notice of an injury to an employer will not act as a bar to the claim if the employer either (1) had knowledge of the injury or (2) was not prejudiced by the lack of notice. See 33 U.S.C. §912(d)(1),(2); See Sheek v. General Dynamics Corp., 18 BRBS 151 (1986), decision on recon., modifying 18 BRBS 1(1985).

In the absence of evidence to the contrary, Section 20(b) of the Act presumes that the notice of injury and the filing of the claim were timely. See Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989). Accordingly, to establish prejudice, the employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to claimant's failure

to provide timely notice pursuant to Section 12. See Cox v. Brady-Hamilton Stevedore Company, 25 BRBS 203 (1991); Bivens v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 233 (1990).

Prejudice is established where the employer demonstrates that due to the claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the alleged injury or to provide medical services. Strachan Shipping Co. v. Davis, 571 F.2d 968, 972, 8 BRBS 161 (CRT) (5th Cir. 1978); Addison v. Ryan Walsh Stevedoring Company, 22 BRBS 32 (1989).

Employer/Carrier contend they were not notified within the 30 days allowed by statute of Claimant's work-related injury claimed to have occurred on January 21, 1999, and April 26, 1999, and were prejudiced by such lack of notice. There is no evidence in the record that Claimant notified Employer/Carrier timely. As the injuries alleged on those dates were herein found not to constitute compensable injuries within the purview of the Act, the argument is rendered moot.

Employer/Carrier further contend that they were not notified of Claimant's back and shoulder injury within 30 days following the June 7, 1999 injury to Claimant's knee, and were prejudiced by such lack of notice.

Claimant contends injury occurred to his knee, shoulder, and back on June 7, 1999. When interviewed by Sheila Taylor on June 21, 1999, Claimant stated that pain began on [Monday] June 7, 1999, as he was "going through a lot of real tight holes . . . turning and twisting," and his leg started aching "real bad" that day, behind his left knee. He stated he went to the medic who told him to come back tomorrow, and by Wednesday "it was aching real bad." Medical records confirm that Claimant presented to UrgiCare on Wednesday, June 9, 1999, with complaints of injury while "climbing through a hole" of "pain back of knee radiating down back of lower leg into foot with toe getting numb, history of knee swelling 1/99." Employer filed Form LS-202, Employer's First Report of Injury dated June 22, 1999, stating the date Employer or foreman first knew of the accident was June 15, 1999. Claimant has presented no evidence of written notice.

Employer/Carrier had notice of Claimant's injuries on August 6, 1999, as the record includes an entry to that effect in Employer's first aid facility log.

Employer/Carrier clearly had notice, though not necessarily written notice, of Claimant's knee injury and its claimed work-related origin, within 30 days of its occurrence on June 7, 1999. Further, Employer/Carrier had access to medical records that clearly show injury beyond Claimant's knee alone. I find Employer/Carrier were not hindered in their ability to investigate this occurrence.

As Employer/Carrier had timely notice of the June 7, 1999 incident, and had ample opportunity to investigate, I find that Employer/Carrier was not prejudiced by "untimely notice" of Claimant's back and shoulder injuries that stemmed from the same incident.

Based on the foregoing, I find and conclude the present claim is not barred under Section 12(a) for failure to timely provide notice of the claim because Employer was not prejudiced by any alleged untimely notice.

B. Nature and Extent of Disability

Having found that Claimant suffers from a compensable injury, however the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for

a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a

question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

The only medical opinion of record regarding MMI is that of Dr. Rodriguez after Claimant was referred back by Dr. Brown. Dr. Rodriguez is of the opinion that Claimant reached maximum medical improvement on December 12, 2001, with regard to his upper body.

There is no medical opinion of record regarding MMI of Claimant's left knee. The last physical therapy session on September 8, 1999 notes Claimant has a moderate amount of pain in his left knee, right knee is doing fine. Claimant testified at hearing that his knees do not bother him as long as he does not crawl on it. His knee is not currently being treated.

Based on the foregoing, I find that Claimant reached MMI for all work-related injuries on December 12, 2001.

Since Claimant reached MMI on December 12, 2001, the nature of Claimant's disability, should disability be found to exist, is permanent as of that date. According to Employer's Form LS-202, Claimant ceased work on June 15, 1999, and remained off work through July 21, 1999, due to his knee injury. Claimant again ceased work on August 12, 1999, continuing through November 9, 1999. Claimant returned to work on November 10, 1999, and continued working through March 29, 2000, the day before his first shoulder surgery. Claimant has not since returned to work.

As noted in the Vocational Report by Joe Walker dated May 9, 2003, under restrictions imposed by Dr. Rodriguez, Claimant is unable to return to his previous employment.

Accordingly, I find that Claimant was temporarily totally disabled for the periods of June 15, 1999 through July 21, 1999, August 12, 1999 through November 9, 1999, and March 30, 2000 through December 11, 2001.

Based on the foregoing, I find that Claimant reached maximum medical improvement on December 12, 2001, and he is permanently unable to return to his former regular employment as a result of his work-related injury. Claimant has therefore established a **prima facie** case of permanent total disability. Since the extent of disability is an economic as well as a medical inquiry, the extent of disability will be determined by whether or not suitable alternative employment is shown, and the economic value of such employment.

D. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., supra at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., supra at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

In the instant case, Claimant stated he has inquired about jobs, but has not applied for work since last working for Employer. Accordingly, I find that Claimant has not diligently sought employment. Therefore, if suitable alternative employment is found, the economic value of such will impact upon the extent of disability.

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and

that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

As noted in the Vocational Report by Joe Walker dated May 9, 2003, Claimant is currently under permanent restrictions by Dr. Rodriguez of "limited overhead work and lifting of no more than 25 pounds repetitively and a maximum of 50 pounds." Additionally, Claimant represented an inability to perform activity associated with crawling, squatting, kneeling, and ladder climbing because of the work-related injury to his right shoulder and knees. Claimant's reference to ladder climbing arguably would fall under the restriction by Dr. Rodriguez of limited overhead work.

Claimant's representation of his inability to perform crawling is consistent with the medical history. However, the record does not contain a medical opinion or other evidence to support Claimant's contention. There is no medical opinion expressed by any treating or consultative physician that Claimant is limited in his capacity to squat or kneel. Because of this, I find that work restrictions properly include only those imposed by Dr. Rodriguez, and do not include restrictions of activity as listed by Claimant which are unsupported by the medical evidence.

Joe Walker performed a labor market analysis taking into account Claimant's work restrictions and limited mental abilities. He listed six specific jobs which he contends are reasonably available in Claimant's geographic area and within Claimant's physical and mental restrictions. Details of these positions are listed in the Vocational Evidence section above. Each is addressed in turn below.

The physical Requirements of **Buffet (Food Line) Server** do not include overhead activity, but do include reaching, carrying, standing and walking. Although not stated, arguably lifting and carrying are within the prescribed weight limits. Accordingly, I find that the position of Buffet Server, which pays $6.00 per hour, constitutes suitable alternative employment which is within Claimant's work restrictions, and reasonably available in his geographic area.

The duties of **Kitchen Helper** include washing and storing cooking utensils, cleaning, sweeping and moping. The activities do not involve overhead work and are within Claimant's lifting restrictions. Accordingly, I find that the position of Kitchen Helper, which pays $6.00 per hour, constitutes suitable alternative employment which is within Claimant's work restrictions, and is reasonably available in his geographic area.

The duties of **Housekeeper** in a casino setting include collecting empty beverage containers and cleaning around slot machines. The activities do not involve overhead work and are within Claimant's lifting restrictions. Accordingly, I find that the position of Housekeeper, which pays $6.00 an hour, in a casino setting does constitute suitable alternative employment which is within Claimant's work restrictions, and reasonably available in his geographic area.

The duties of **Pizza Restaurant Kitchen Helper** include cleaning and food preparation. The activities do not involve overhead work and are within Claimant's lifting restrictions. Accordingly, I find that the position of Pizza Restaurant Kitchen Helper, which pays $5.15 an hour, constitutes suitable alternative employment which is within Claimant's work restrictions, and reasonably available in his geographic area.

The duties of **Pizza Restaurant Delivery Driver** include receiving payments and making change. This is inappropriate given Claimant's very limited mental abilities as noted above and in Mr. Walker's vocational report. As such, these job requirements exceed Claimant's mental ability. Accordingly, I find that the position of Pizza Restaurant Delivery Driver does not constitute suitable alternative employment.

The physical requirements of **Car Wash Attendant** include overhead work, with reaching, carrying, standing, walking, squatting, bending and stooping. Mr. Walker believes claimant could perform these tasks using his left hand. However the restrictions imposed by Dr. Rodriguez limit overhead work, not only that which Claimant performs with his right hand. As such, these job requirements exceed Claimant's physical capacity. Accordingly, I find that the position of Car Wash Attendant does not constitute suitable alternative employment.

Additional job opportunities identified in the State of Mississippi, Labor Market Information 2001 Occupational Employment and Wage Estimates of Biloxi, Gulfport and Pascagoula

MS, did not include a sufficient description of the precise nature and terms of the positions for a determination of whether Claimant is capable of performing them.

Based on the foregoing, I find that Employer/Carrier have demonstrated suitable alternative employment. The relevant inquiry now becomes what date did Employer/Carrier first show suitable alternate employment to be available. I find that May 9, 2003, the date of the vocational report, a copy of which was sent to Claimant and his attorney, is the earliest date on which Employer/Carrier showed suitable alternative employment to be available.

Accordingly, I find that Claimant is entitled to temporary total disability benefits from June 15, 1999 through July 21, 1999, and from August 12, 1999 through November 9, 1999, and from March 30, 2000 through December 11, 2001, and permanent total disability from December 12, 2001 through May 8, 2003, based on Claimant's stipulated average weekly wage of $652.50.

I further find that Claimant is entitled to permanent partial disability compensation benefits from May 9, 2003, and continuing, based on two-thirds of the difference between Claimant's stipulated average weekly wage of $652.50 and a wage of $5.78 per hour (which is the average of the wage range of jobs found to be suitable alternative employment) based on a work week of 40 hours or $231.20 per week.

E. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Employer/Carrier contend in brief that Claimant has never sought authorization for any of his treatment, and no medical care was authorized. Therefore, Employer/Carrier is not responsible for any medical care.

The incidents occurring in January 1999 and April 1999, have been found not to constitute a work-related injury under the Act. Therefore, Employer/Carrier are not liable for medical expenses for injuries arising directly from those events.

Claimant contends injury on June 7, 1999, which is detailed above. Although treatment for Claimant's knee is well documented, the record is devoid of evidence indicating that Claimant requested medical care prior to or during treatment for his knee.

The date of injury to Claimant's back and shoulder have been assigned above as August 6, 1999. Claimant presented to Employer's first aid station on that date and subsequently complaining of back, shoulder and knee pain.

Claimant presented to OccuMed Gulf Coast Medical Center on August 12, 1999, and again as a follow-up on August 18, 1999. The medical record is notated on August 18, 1999, by B. Pitalo, Clerk at Gulf Coast Medical Center, stating she spoke to Sheila Taylor, Workman's Compensation representative, who said "we are not authorized for any more treatment until she sees medical notes." The same day, a notation is made by R. J. Cunningham, the attending physician, stating "explained to patient no authorization to treat any more today. Patient requests neurology consult. Will arrange; he understands this will be on his account."

The notations in the medical record clearly indicate that authorization for medical care was requested, denied at that time by Sheila Taylor, and this denial was communicated to Claimant.

Based on the foregoing, I find that Employer/Carrier denied requested medical care to Claimant on August 18, 1999, and that this denial released Claimant from further obligation to seek authorization from Employer/Carrier for medical care.

Accordingly, I find that Claimant is entitled to reasonable and necessary medical care and treatment for his work-related injuries to his left knee, back, and right shoulder, including the aggravation thereof, and related complications and conditions from August 18, 1999, through present and continuing.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[4] A

[4] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981),

service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. Section 8(f) Application

Section 8(f) of the Act provides in pertinent part:

> (f) Injury increasing disability: (1) In any case which an employee having an existing permanent partial disability suffers [an] injury . . . of total and permanent disability or of death, found not to be due solely to that injury, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.
>
> (2)(A) After cessation of the payments . . . the employee . . . shall be paid the remainder of the compensation that would be due out of the special fund established in section 44 . . . 33 U.S.C. § 908(f).

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. Director, OWCP v. Cargill Inc., 709 F.2d 616, 619 (9th Cir. 1983).

The District Director has not filed an opposition to relief after the Regional Solicitor was provided a copy of the hearing transcript. However, the position of the Regional Solicitor as stated on August 1, 2005, was second fund relief should be denied for failure to "identify any disability," thereby failing to establish the manifest and combination effect elements.

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability, (2) the pre-existing disability was manifest to the employer, and (3) that the current disability is not due solely to the

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aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **December 14, 2004**, the date this matter was referred from the District Director.

employment injury. 33 U.S.C. § 908(f) Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); 33 U.S.C. § 908(f); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); C&P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), rev'g 4 BRBS 23 (1976); Lockhart v. General Dynamics Corp., 20 BRBS 219, 222 (1988). In permanent partial disability cases, an additional requirement must be shown, i.e., that Claimant's disability is materially and substantially greater than that which would have resulted from the new injury alone. 33 U.S.C. §908(f)(1); Louis Dreyfus Corp. v. Director, OWCP, 125 F.3d 884 (5th Cir. 1997).

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). Employment related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f), and the aggravation will be treated as a second injury in such case. Strachan Shipping Company v. Nash, supra, at 516-517 (5th Cir. 1986) (en banc).

Section 8(f) is to be liberally applied in favor of the employer. Maryland Shipbuilding and Drydock Co. V. Director, OWCP, U.S. DOL, 618 F.2d 1082 (4th Cir. 1980); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 317 (9th Cir. 1980), aff'g Ashley v. Todd Shipyards Corp., 10 BRBS 423 (1978). The reason for this liberal application of Section 8(f) is to encourage employers to hire disabled or handicapped individuals. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949).

"Pre-existing disability" refers to disability in fact and not necessarily disability as recorded for compensation purposes. Id. "Disability" as defined in Section 8(f) is not confined to conditions which cause purely economic loss. C&P Telephone Company, supra. "Disability" includes physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability. Campbell Industries Inc., supra; Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192, 1197-1199 (5th Cir. 1977).

1. Pre-existing permanent partial disability

In this matter, the medical evidence supports a finding that Claimant had cervical disc disease. Specifically, Dr. Rodriguez noted cervical disc disease on January 28, 2000, which was noted also by Dr. Treg on December 3, 2001. Dr. Smith, interpreting a nerve conduction study on December 4, 2000, noted proximal disease at approximately L5 and S1 discs. On December 8, 2000, Dr. Smith noted an MRI of Claimant's cervical spine on November 8, 2000 revealed "mild central protrusion of the C5-6 disc with little impingement on the thecal sac" with "no evidence of nerve root involvement." After ordering an MRI of Claimant's lumbar region for comparison to one taken September 10, 1999, degenerative changes were noted at T12-L1, L4-5, and L5-S1.

Claimant testified that his neck was injured in 1992 resulting in lost work time for which he collected workman's compensation. He also testified to treatment by a series of chiropractors. Claimant informed Dr. Seidensticker on August 24, 1999, that he had quit working on August 12, 1999, more because of back pain than his knees.

Although no date or cause for Claimant's cervical disc disease are assigned by Claimant's doctors, it is reasonable to assume that such changes took place over a significant period of time and may have originated or existed prior to Claimant's employment with Employer, and almost certainly existed prior to Claimant's first compensable injury on June 7, 1999. This conclusion is based on the fact that minimal stenosis at L3-4 and disc protrusion at L4-5 were noted by Dr. Smith as existing on Claimant's MRI taken September 10, 1999, and further degeneration was noted in the MRI ordered in December 2000, by Dr. Smith. Dr. Smith further noted on December 15, 2000, in reviewing the second MRI that he assumed changes were "old."

Furthermore, cervical disc disease, by its chronic and irreversible nature constitutes a physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability.

Assuming, **arguendo**, that Claimant's cervical disc disease existed prior to Claimant's employment with Employer, it would have constituted a pre-existing permanent partial disability.

Accordingly, I find that Claimant had a pre-existing permanent partial disability prior to his first compensable injury on June 7, 1999.

2. Manifestation to the Employer

The judicially created "manifest" requirement does not mandate actual knowledge of the pre-existing disability. If, prior to the subsequent injury, employer had knowledge of the pre-existing condition, or there were medical records in existence from which the condition was objectively determinable, the manifest requirement will be met. Equitable Equipment Co., supra; See Eymard v. Sons Shipyard v. Smith, 862 F.2d 1220, 1224 (5th Cir. 1989).

The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest. Todd v. Todd Shipyards Corp., 16 BRBS 163, 167-168 (1984). If a diagnosis is unstated, there must be a sufficiently unambiguous, objective, and obvious indication of a disability reflected by the factual information contained in the available medical records at the time of injury. Currie, 23 BRBS at 426. Furthermore, a disability is not "manifest" simply because it was "discoverable" had proper testing been performed. Eymard & Sons Shipyard v. Smith, supra; C.G. Willis, Inc. v. Director, OWCP, 28 BRBS 84, 88 (CRT) (1994). There is not a requirement that the pre-existing condition be manifest at the time of hiring, only that it be manifest at the time of the compensable (subsequent) injury. Director, OWCP v. Cargill, Inc., 709 F.2d 616 (9th Cir. 1983) (en banc).

No medical evidence has been advanced by Employer/Carrier to indicate that Claimant's cervical disc disease existed either at the time of hire or prior to Claimant's first compensable injury on June 7, 1999. None of the medical records proffered by Employer/Carrier in their Exhibit B to the petition for second injury fund relief indicate an examination date prior to Claimant's first compensable injury. The only medical evidence of record that pre-dates Claimant's first compensable injury relates to a fractured ankle Claimant suffered in 1985, apparently as the result of a fall at work. The record is also devoid of any other evidence, such as disclosure on pre-employment forms, to indicate that Claimant's pre-existing condition was made manifest to Employer prior to his compensable injury.

Accordingly, I find that Claimant's pre-existing permanent partial disability was not manifest to Employer/Carrier, specifically or constructively, prior to Claimant's first compensable injury.

3. The pre-existing disability's contribution to a greater degree of permanent disability

Section 8(f) will not apply to relieve Employer of liability unless it can be shown that an employee's permanent total disability was not due solely to the most recent work-related injury. Two "R" Drilling Co. v. Director, OWCP, supra. An employer must set forth evidence to show that a claimant's pre-existing permanent disability combines with or contributes to a claimant's current injury resulting in a greater degree of permanent partial or total disability. Id. If a claimant's permanent total disability is a result of his work injury alone, Section 8(f) does not apply. C&P Telephone Co., supra; Picoriello v. Caddell Dry Dock Co., 12 BRBS 84 (1980). Moreover, Section 8(f) does not apply when a claimant's permanent total disability results from the progression of, or is a direct and natural consequence of, a pre-existing disability. Cf. Jacksonville Shipyards, Inc. v. Director, OWCP, 851 F.2d 1314, 1316-1317 (11th Cir. 1988).

The medical evidence does not support a finding that Claimant's pre-existing condition combined with or contributed to Claimant's present disability. In fact, the medical record supports a contrary conclusion.

On August 24, 1999, Dr. Seidensticker referred Claimant to a neurosurgeon, Dr. Lowry, for his back pain. Dr. Lowry ordered an MRI which was performed on October 28, 1999. On November 3, 1999, Dr. Lowry noted "cervical spine MRI is essentially normal . . . minimal stenosis at C5-6 . . . Impression: "I see no surgical lesions nor any other pathology that would account for his level of pain." There is nothing in the record to indicate that Dr. Lowry's findings were later found erroneous. Therefore, the medical evidence does not support a finding of any relationship between Claimant's pre-existing condition and subsequent disability.

Claimant's testimony and medical history as related to various doctors' references Claimant's claimed April 1999 fall over angle iron as the origin of some of Claimant's back and

shoulder pain. However, these vague references are not sufficient to establish a relationship between Claimant's pre-existing condition and subsequent disability.

I find that insufficient evidence has been introduced to establish that Claimant's pre-existing disability combined with or contributed to a Claimant's current injury or that it resulted in a greater degree of disability.

Accordingly, I find and conclude that Employer/Carrier have not established the pre-requisites necessary for entitlement to Section 8(f) relief under the Act and are therefore ineligible to receive Section 8(f) relief.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from June 15, 1999 to July 21, 1999, from August 12, 1999 to November 9, 1999, and from March 30, 2000 to December 11, 2001, based on Claimant's average weekly wage of $652.50, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from December 12, 2001 to May 8, 2003, based on Claimant's average weekly wage of $652.50, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay Claimant compensation for permanent partial disability from May 8, 2003 and continuing based on two-thirds of the difference between Claimant's average weekly wage of $652.50 and his reduced weekly earning capacity of $231.20 ($5.78 per hour x 40 hours per week) in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

4. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2002, for the applicable period of permanent total disability.

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's June 7, 1999 and August 6, 1999, work injuries, pursuant to the provisions of Section 7 of the Act.

6. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

8. Employer's Application for Section 8(f) relief is hereby **DENIED.**

ORDERED this 5th day of December, 2006, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge